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First Named Inventor

Ian Baird Smith et al

Art Unit

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Examiner Name

Robin Annette Hylton

Attorney Docket Number

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Fee Transmittal Form



Fee Attached



Amendment/Reply



After Final



Affidavits/declaration(s)



Extension of Time Request



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Enclosed is Appellants' Reply Brief (16 pages).

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

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Date

February 2, 2009

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Serial No. 09/445,043

Reply to Examiner's Answer dated December 1, 2008

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before The Board of Patent Appeals and Interferences

Applicant: Ian Baird Smith et al.

Serial No.: 09/445,043

Filing Date: March 20, 2000

Title: APPARATUS AND METHOD FOR
CLOSING OFF THE OPEN END
OF A CONTAINER WITH A
REMOVABLE FLEXIBLE
MEMBRANE COVERED BY A
RIGID CAP

Group Art Unit: 3781

Examiner: Robin Annette Hylton

Docket No: 350013-000065

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APPELLANTS' REPLY BRIEF UNDER 37 C.F.R. §41.41

In response to the Examiner's Answer dated December 1, 2008, Appellants timely submit this Reply Brief under C.F.R. §41.41 within two months of the Examiner's Answer (February 1, 2009 being a Sunday, this Brief being filed on Monday, February 2, 2009 in accordance with 37 C.F.R. §1.7(a)).

1. STATUS OF CLAIMS

Claims 1, 3, 4, 6, 8-11, and 13 are pending and are herein appealed. Claims 2, 5, 7, 12, and 14-22 have been cancelled.

Claims 1, 3, 6, 9, 10, and 13 have been rejected pursuant to 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 8 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962, in view of *Hardt*, U.S. Patent No. 4,328,905.

Claims 1, 3, 4, 6, 8-10, and 13 have been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962.

Claim 11 has been rejected pursuant to 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962, and further in view of *Hardt*, U.S. Patent No. 4,328,905.

2. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The Office rejected claims 1, 3, 6, 9, 10, and 13 under 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this anticipation rejection, has the Office established a *prima facie* case of anticipation?

The Office rejected claim 8 under 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claim 11 under 35 U.S.C. § 103(a) as being unpatentable over *Sekiguchi et al.*, Japanese Patent No. 62-122962, in view of *Hardt*, U.S. Patent No. 4,328,905. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claims 1, 3, 4, 6, 8-10, and 13 under 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

The Office rejected claim 11 under 35 U.S.C. § 103(a) as being unpatentable over *Hiroshi*, Japanese Patent No. 6-219464, in view of *Sekiguchi et al.*, Japanese Patent No. 62-122962, and further in view of *Hardt*, U.S. Patent No. 4,328,905. In making this obviousness rejection, has the Office established a *prima facie* case of obviousness?

3. APPELLANTS' STATEMENTS REGARDING THE EXAMINER'S ANSWER

A. Claims 1, 3, 6, 9, 10, and 13 Are Not Anticipated by *Sekiguchi et al.* (Japanese Patent No. 62-122962) under 35 U.S.C. §102(b).

In the Examiner's Answer, referring to FIG. 1 the Examiner states that "It can be seen that the lowermost point of the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member." Appellants respectfully disagree. It cannot be seen from FIG. 1 what the maximum possible extension of the flexible membrane towards the laminar member is. Anticipation requires that each and every element of the claim be found in a single prior art reference. *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983); *Atlas Powder v. E.I. du Pont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984). *Sekiguchi et al.* fail to disclose all the limitations of the claimed invention, and, therefore, cannot and do not anticipate the present invention.

In particular, *Sekiguchi et al.* fail to disclose the precise relationship between the laminar member and the flexible membrane claimed by Appellants, namely "wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member"¹ and this precise spatial relationship cannot be *seen* in FIG. 1 as stated by the Examiner.

¹ The Board of Appeals and Interferences interpreted this claim limitation as meaning the "maximum possible extension" that the membrane would be able to undergo in absence of the laminar member. Footnote 1, BPAI Decision, April 23, 2007. In other words, the laminar member is positioned to prevent the membrane from extending to its maximum point in order to prevent it from being

The Examiner further states that *Sekiguchi et al.*'s laminar member inherently meets the claimed limitation.

As *seen* in FIG. 1, the flexible membrane is shown to be at its maximum spaced distance from the laminar membrane . . . This can be *seen* in the drawing despite there being no disclosure of the drawing being drawn to scale.

Appellants respectfully disagree. The precise position of the flexible membrane in relation to the laminar member cannot be *seen* from FIG. 1 of *Sekiguchi et al.* What can be seen in FIG. 1 of *Sekiguchi et al.* is simply that an air space exists. We have no idea of whether the laminar member is spaced from the flexible membrane at a distance that is less than the maximum possible extension of the membrane (and therefore prevents it from bursting) or not. This is simply not disclosed by *Sekiguchi et al.* and it cannot be seen in FIG. 1 as drawings in patent applications are not drawn to scale. *Sekiguchi et al.* do not disclose either in the specification or in FIG. 1 anything about the position of the flexible membrane in relation to the laminar member. Appellant respectfully requests that the rejections of the claims under 35 U.S.C. § 102(b) as being anticipated by *Sekiguchi et al.* be reversed.

B. *Sekiguchi et al.* Does Not Disclose the Limitations of Independent Claim 1 and Therefore Neither Claim 8 Nor Claim 11 Is Obvious over *Sekiguchi et al.*.

Claims 8 and 11 depend from Claim 1. If an independent claim if a reference does not disclose the limitation in an independent claim the claims depending therefrom are not obvious in view of the same reference. *Sekiguchi et al.* does not disclose that the "laminar member is

damaged or from bursting. See Appellants specification at [0054] – [0058] The Board of Appeals correctly interpreted the claimed limitation and is the one that Appellants use herein.

spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member” and therefore, *Sekiguchi et al.* alone cannot make obvious a resiliently deformable member comprised of a foamed material secured to the rigid cap and *Sekiguchi et al.* in view of *Hardt* does not make a lifting tab hingedly secured to the flexible member obvious.

C. Claims 1, 3, 4, 6, 8-10 and 13 Are Not Unpatentable Under 35 U.S.C. §103(a) over Hiroshi (JP 6-219464) In View Of Sekiguchi et al.

The Examiner reiterates the reasons for rejecting the claims as set forth in the January 11, 2008 Final Office Action (the “Final Rejection”), as permitted under MPEP 1207.02. In addressing Appellants’ hindsight argument, the Examiner states that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight. Relying on *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971) the Examiner states that so long as the hindsight reasoning takes into account only knowledge with was within the level of ordinary skill at the time the claim invention was made, and does not include knowledge gleaned only from the applicant’s disclosure, such a reconstruction is proper.

Appellants agree that a skilled artisan examining a prior art reference does so with a certain background knowledge and understanding. If an item of prior art has a gap in it that, if not filled, would result in the claimed invention not being anticipated, may that gap be filled with the general background knowledge of that person? Yes, of course, but U.S.C. §103(a) expressly requires that obviousness or nonobviousness be determined for the claimed subject matter “as a whole.”

The Board of Patent Appeals and Interferences has already determined that the *Hiroshi* reference alone does not make the claimed invention obvious. BPAI Decision, April 23, 2007. The Final Rejection acknowledges this. Final Rejection, page 4, lines 5-7. However, the deficiencies of *Hiroshi* are not completed by *Sekiguchi et al.* The Examiner's Answer states that it is known from *Sekiguchi et al.* to provide a container assembly in which the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member to provide a container liner seal that is less likely to rupture due to pressure within the sealed container. Appellants contend that no such limitation is disclosed or suggested by *Sekiguchi et al.*

The Examiner states that the rejection of the appealed claims is based not only upon the knowledge of one of ordinary skill in the art at the time the invention was made but also in view of the disclosure of *Sekiguchi et al.* and not upon impermissible hindsight. The Examiner states that based on this knowledge one would conclude that the membrane of *Sekiguchi et al.* would flex upon pressure build-up in the closed container. The Examiner states that the air space (4) is expanded and contracted as the flexible membrane (2) flexes both toward and away from the laminar member (3) as disclosed in *Sekiguchi et al.*

Appellants acknowledge that *Sekiguchi et al.* disclose that an air space exists between the cap top wall and the flexible membrane.

If a sealed container that is in the state shown in Fig. 1 is subjected to heat sterilization at 90°C or above or retort sterilization at 110-120°C, the internal pressure of the said air layer and the internal pressure of the glass container are balanced relatively easily through the expansion and contraction of the air layer present inside airtight space (4) and therefore no particularly great force is applied to inner cap (2) and its heat seal part and consequently the seal is not broken.

Sekiguchi et al., page 4, paragraph 3

But *Sekiguchi et al.* does not disclose any particular relation between the top cap and the flexible membrane. *Sekiguchi et al.* does disclose that the air space can be varied.

FIG. 2 shows inner cap (2) in which central part (7) projects downwards. In this case, airtight space (4) can be made bigger than that in the sealed container shown in FIG. 1 and therefore it can withstand larger variation in pressure.

Sekiguchi et al., page 4, paragraph 4

Despite the foregoing disclosure, *Sekiguchi et al.* do not disclose or suggest the very precise relationship between the laminar member and the flexible member claimed by Appellants and therefore *Sekiguchi et al.* do not make that relationship obvious.

The Examiner states:

As seen in FIG. 1, the flexible membrane is shown to be at its maximum spaced distance from the laminar membrane. As discussed above, the flexible membrane moves toward the laminar member with the build-up of pressure inside the closed container. The smallest amount of movement of the flexible membrane toward the laminar member will meet the claimed limitation.

Examiner's Answer, page 6.

However, this interpretation cannot be correct. FIG. 1 does not suggest that the flexible membrane is at the "maximum spaced distance from the laminar member" as the Examiner contends and it cannot be seen.

The Examiner also states that the smallest amount of movement of the flexible membrane toward the laminar member will meet the claimed limitation. Appellants respectfully disagree. The claimed limitation refers to the laminar member being positioned in the container assembly, i.e. at the initial state, so that upon the maximum possible extension when the contents are

subjected to pressure the laminar member prevents the membrane from reaching its maximum possible extension. The claimed limitation is: "wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member." Thus, the smallest amount of movement of the laminar member will not meet the claimed limitation as the Examiner has stated and no such relationship is shown or suggested by *Sekiguchi et al.* In fact, *Sekiguchi et al.* disclose that "no particularly great force is applied to inner cap and its heat seal part . . ." Therefore, it could not possibly meet the claimed limitation. Appellants contend that the Final Rejection and the position of the Examiner in the Examiner's Answer impermissibly relies on hindsight gleaned from Applicants disclosure and claimed limitation. Finding obviousness through hindsight, i.e. after the fact of the invention and with the teachings of the inventor available, is impermissible. *Al-Site Corp. v. VSI Int'l Inc.*, 50 USPQ2d 1161 (Fed. Cir. 1999).

The Examiner states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of providing the laminar member being spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member. Doing so provides a container liner seal that is less likely to rupture do [sic-due] to pressure buildup within the sealed container.

Examiner's Answer, page 5, paragraph 1

Appellants disclose in their specification that the membrane 11 expands during cooking of food inside the can. Specification, [0056]. Appellants further disclose that the presence of the circular disk portion 21 of the rigid cap 12 "prevents rupture of membrane 11" when pressure is generated during cooking. Specification [0057]. The laminar member is applied to the side of

the rigid cap facing the flexible membrane. Thus Appellants' specification discloses that the rigid cap with the laminar membrane prevents rupture of the flexible membrane when the flexible membrane expands from pressure built up inside the can during cooking. Thus, the Examiner's rationale for modifying *Hiroshi* with the disclosure of *Sekiguchi et al.* is virtually identical to Appellants disclosure as opposed to any disclosure made or suggested by *Sekiguchi et al.*

The Examiner admits that the drawings of *Sekiguchi et al.* are not drawn to scale but nevertheless argues that the drawings of *Sekiguchi et al.* in combination with the disclosure and knowledge of one of ordinary skill in the art suggest the claimed limitation. Both *Hirsohi* and *Sekiguchi et al.* disclose a small space between the cap and the flexible membrane. However, Appellants contend that the depiction of a small space in the figures in combination with the disclosure of *Sekiguchi et al.* do not suggest the precise limitation claimed in claim 1 to one of ordinary skill in the art.

Not only does *Sekiguchi et al.* fail to disclose the claimed relationship between the laminar member and the flexible membrane, there is nothing in FIG. 1 that shows or suggests what the maximum extension of flexible membrane 2 would be if extended in a direction towards the closure of the container despite the Examiner's statements to the contrary. The possible variation in spacing disclosed by *Sekiguchi et al.* does not make the claimed invention obvious because one skilled in the art would need to conduct undue experimentation regarding an infinite number of spacing possibilities with no reasonable expectation of success. "Obviousness does not require absolute predictability but a reasonable expectation of success is necessary." *Amgen, Inc. v. Chugai Pharmaceutical Co.*, 18 USPQ2d 1016 (Fed. Cir. 1991). A

prior art suggestion for virtually endless experimentation does not make a prima facie case of obviousness. *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1532 (Fed. Cir. 1989) (Emphasis added.).

At best, in view of the disclosure of *Sekiguchi et al.*, one skilled in the art might find it obvious to try various combinations of positioning the flexible membrane in the container while being assembled until such a skilled artisan found the precise spatial relationship claimed by Appellants. However, this is not the standard of 35 U.S.C. §103(a). *In re Gieger*, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). Applicants claim a very precise limitation that is neither suggested nor made obvious by the theoretical combination of *Hiroshi* and *Sekiguchi et al.* All claim limitations must be considered, especially when missing from the prior art. *In re Fine*, 5 USPQ2d 1596 (Fed. Cir. 1988).

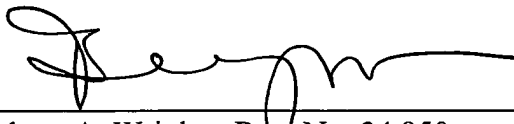
Accordingly, a prima facie case of obviousness over *Hiroshi* in view of *Sekiguchi et al.* has not been made. Appellants respectfully request that the rejection of the claims under 35 U.S.C. § 103(a) be reversed and a Notice of Allowance be issued.

4. CONCLUSION

Pending claims 1, 2, 4, 6, 8-11, and 13 remain rejected under 35 U.S.C. §§ 102 and 103(a). Appellants respectfully assert that the Examiner has not established anticipation of those claims by *Sekiguchi et al.* and has not established a *prima facie* case of obviousness over *Hiroshi* in view of *Sekiguchi et al.* Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's decision on all counts.

This Reply Brief is being submitted within the time period specified in 37 C.F.R. §41.41 with no applicable extensions of time. Therefore, it is believed that no fees are required; however, if it is determined that fees are required the Commissioner is hereby authorized to charge any necessary fees, and to credit any such fees or overpayment, to Deposit Account No. 50-1901 (Reference: 350013-000065).

Respectfully submitted,

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(A) CLAIMS APPENDIX

1. (Previously Presented) A container assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising:

- (i) a flexible membrane for closing the open end of the container;
- (ii) an adhesive seal between the flexible membrane and the container;
- (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;

- (iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and

- (v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

2. (Cancelled)

3. (Previously Presented) A container assembly according to Claim 1 wherein the first and second cam and follower pairs include co-operating screw threads formed respectively on the container neck and the rigid cap.

4. (Previously Presented) A container assembly according to Claim 1 further having an annular flange, the resiliently deformable member is substantially congruent with the flange, and wherein the rigid cap is in place over the container, the resiliently deformable member presses the flexible membrane against the flange.

5. (Cancelled)

6. (Previously Presented) A container assembly according the Claim 1 wherein the laminar member is a circular disc, and the skirt extends from the outer periphery thereof.

7. (Cancelled)

8. (Previously Presented) A container assembly according to Claim 1 wherein the resiliently deformable member comprises a foamed material secured to the rigid cap.

9. (Previously Presented) A container assembly according to Claim 1 wherein the flexible membrane comprises a metal foil adhesively securable on the container neck.

10. (Previously Presented) A container assembly according to Claim 4 wherein the rigid cap is shaped for use with the container neck which is generally cylindrical in shape.

11. (Previously Presented) A container assembly according to Claim 1 including a lifting tab hingedly secured to the flexible membrane and is comprised of the same material as that of the flexible membrane.

12. (Cancelled)

13. (Previously Presented) A container assembly according to Claim 1 wherein the rigid cap supports the body of the can in a radial direction.

14. (Withdrawn) A method of closing a container with a closure to form a container assembly according to Claim 1 comprising the steps of:

(i) adhesively securing said flexible membrane on the open end of a the neck of the container, thereby forming said seal;

(ii) engaging the cam and follower of a said rigid cap and the container neck, with one another; and

(iii) moving the rigid cap and the container neck relative to one another to cause relative movement between the cam and the follower in the predetermined direction, thereby causing the resiliently deformable member to press the flexible membrane against the container in the vicinity of the seal sufficiently to maintain the seal against pressures generated in the container on cooking of its contents.

15. (Withdrawn) A method according to Claim 14 including the step of securing the flexible membrane on the open end of the said container neck by use of a heat-sealing method such as heat contact, ultrasonic, induction or hot air heating.

16. (Withdrawn) A method according to Claim 14 wherein the step of moving the rigid cap and the container neck relative to one another includes rotating the rigid cap and the container relative to one another.

17. (Withdrawn) A method according to Claim 14 wherein the step of adhesively securing the flexible membrane on the open end of the container neck includes the sub steps of applying adhesive material to the flexible membrane and/or the container neck; engaging the flexible membrane and the container neck with one another to define the seal; and curing the adhesive material.

18. (Withdrawn) A method according to Claim 17 wherein the substep of curing the adhesive material includes heating thereof.

19-21. (Cancelled)

22. (Withdrawn) A method according to Claim 14 including the steps of:

Adding food to the container through a second open end of the container which is opposite said open end closed by said closure;

closing said second open end by a conventional can end;

heating said food within said container to cook said food; and

preventing rupture of said flexible membrane due to internal container pressure caused by said heating by the presence of said laminar member of said cap.